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Indexed as:
X.Y. (Re)

IN THE MATTER OF an appeal by X.Y.
AICAC File No.: AC-99-73

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[1999] M.A.I.C.A.C.D. No. 52

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Manitoba Automobile Injury Compensation Appeal Commission
J.F.R. Taylor, Q.C. (Chairperson), C.T. Birt, Q.C., and
L. Goodspeed

Heard: December 15, 1999.
Decision: December 21, 1999.
(22 paras.)

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Issues(s) :

- (i) Whether Appellant's income replacement indemnity ('IRI') benefits properly terminated; and
- (ii) Whether Appellant capable of resuming former employment.

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Relevant Sections:

Section 110(1) (a) of the MPIC Act.

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Appearances:

Manitoba Public Insurance Corporation ('MPIC') represented by
Keith Addison.

John S. Michaels appeared for the appellant, X.Y.

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MAIC NOTE: THIS DECISION HAS BEEN EDITED TO PROTECT THE
PERSONAL HEALTH INFORMATION OF INDIVIDUALS BY REMOVING
PERSONAL IDENTIFIERS AND OTHER IDENTIFYING INFORMATION.

REASONS FOR DECISION

[para1] X.Y. was born in the [text deleted] on the [text deleted]. After eight years of schooling in [text deleted], she worked there as a sewing machine operator. She came to Winnipeg in September of 1992 at the age of [text deleted], to join her husband. She started work as a sewing machine operator for [text deleted] in the second week after her arrival in Canada, concurrently studying English in the evenings until her twins were born in June, [text deleted].

X.Y. took six months maternity leave and then went back to work. She was laid off for a short while, apparently due to slow business, but was called back to work from 1994 through 1996 (interrupted by a three-month visit to [text deleted] due primarily to the death of her father).

[para2] In [text deleted] X.Y.'s third child was born. She was obliged to take early maternity leave because she developed a jaundiced condition. Three months after the birth of her third child she tried to return to [text deleted], but financial difficulties had caused that corporation to close so she started working for [text deleted], doing the same kind of work for about three and a half months. During the periods when she was not working, she did not seek employment insurance.

[para3] Finding that there was not enough work to do at [text deleted], X.Y. sought and obtained employment at [text deleted], where she worked on a piece-work basis, earning slightly in excess of \$[text deleted] per hour.

[para4] X.Y. testified that, since her return to work in 1996, her mother had joined them and was looking after the children. She, her husband, her mother and her children all live in a small home on [text deleted] in Winnipeg which they started buying in May of 1994. Her mother and three children all sleep in one bedroom; she and her husband in the other. She is anxious to go back to work so that the family can acquire a larger home. More recently, in June of 1999, the Appellant's [text deleted] year old mother has obtained employment outside the home, chopping vegetables and deep-frying food in a restaurant for four hours per day, since the Appellant's husband's income is not enough to support the entire family.

[para5] The foregoing details would not normally be particularly relevant. They are noted here because her adjuster at MPIC has suggested that "it very well may be that she is content to sit at home" and that "it would appear that monetary issues are driving this claim rather than pure objective physical findings". We do not accept those suspicions as being well-founded. The evidence persuades us that the Appellant is a conscientious worker and mother with a history of hard work interrupted only for valid reasons, and strongly motivated to return to work.

[para6] On September 30th, 1997, X.Y. was involved in a motor vehicle accident wherein, as a passenger in a 1988 Toyota, she sustained a fractured sternum and musculoligamentous strain to her cervical and lumbar regions. She was initially seen by her family physician, Dr. T. H. Gooi, whose report of October 6th, 1997 indicated a significant limitation in function, an inability to work at

any job, a fractured sternum, sore chest, neck and back pain, bruises over the Appellant's lower limbs, reduced range of motion and an anticipated duration of in-clinic care of eight weeks.

[para7] X.Y. also attended upon Dr. William J. Rothman, chiropractor, whom she appears to have started seeing on October 16th, 1997.

[para8] By the end of January, 1998, Dr. Gooi recommended a gradual return to work ('GRTW') program, to commence on February 16th. X.Y. attempted that GRTW but found herself unable to work for more than one hour. She went home; stayed home the next day and then tried again. That pattern prevailed for the next couple of weeks but, she testified, the pain across her chest and back were too much for her to bear. She reported these symptoms to Dr. Gooi and to the physiotherapist to whom she had been referred; each of them told her to stay off work.

[para9] She went back to work on February 23rd, 1998, for three hours but was then told to stay away for the rest of the week because of shortage of work at [text deleted] plant. She tried again on March 2nd for two and one half hours, on March 3rd for three hours and on March 4th for two hours, at which point she left the factory in order to see Dr. Gooi, who told her to stay off work for two more weeks.

[para10] In a discussion on March 12th, 1998, as reported to X.Y.'s adjuster at MPIC, Mr. Norman Greenberg, Dr. Gooi had advised Dr. Rothman that he wanted to arrange for a CT scan for the Appellant. Dr. Rothman had suggested that that procedure might take too long and that a bone scan should be sufficient, since he felt it possible that some cartilage had come away from the Appellant's sternum in the course of her motor vehicle accident. Drs. Gooi and Rothman had apparently agreed that the Appellant would be off work for at least a few more weeks and that, if no objective information emerged from the scanning process, it might be wise to send the Appellant to Dr. Lau, a psychiatrist, for an assessment.

[para11] The bone scan of X.Y.'s thoracic cage was completed on March 19th, 1998. The results reflected

Mildly increased uptake is seen in the lower aspect of the sternum, presumably representing the ongoing healing in the none fracture. The uptake is not intense and no underlying complications are suspected.

[para12] A subsequent report from Dr. Rothman to MPIC indicated that the Appellant had been given a note from Dr. Gooi, excusing her from any return to work until May. Dr. Rothman expressed the view that the Appellant's symptoms and

disability had persisted beyond the expected recovery time. On examination, he said, X.Y.'s "pain in the sternocostal area is brought on by trunk extension and by direct pressure on the sternum. Her chest expansion in deep inspiration is limited somewhat by pain." He suggested that referral to a psychiatrist would be beneficial. The foregoing clinical note accompanied a more formal Health Care Provider Progress Report from Dr. Rothman to MPIC, dated April 8th, 1998. That report notes a measured chest expansion of about one-half the norm, "although she may not be putting forth her strongest effort". Dr. Rothman indicated a functional classification for X.Y. of "less than full function due to symptoms and/or functional deficits", and again suggested referral to a psychiatrist. Dr. Rothman felt that X.Y. should be able to return to work on May 1st of 1998.

[para13] Based upon Dr. Rothman's report of April 8th, Mr. Greenberg wrote to the Appellant on April 24th to tell her that her income replacement would continue until May 1st, but not beyond that point.

[para14] Dr. Gooi then arranged for the Appellant to be examined by Dr. R. N. Kippen, a specialist in gastroenterology with the Winnipeg Clinic, who saw her on June 3rd, 1998. That referral was made, in part because of the Appellant's continuing chest pains and, in part also, because she was also suffering from odynophagia (that is, pain on swallowing).

[para15] Meanwhile, the Appellant had applied for an internal review of her adjuster's decision to discontinue her IRI, and Dr. Gooi was still advising her to remain off work pending the outcome of further examination - Dr. Gooi's memo of July 9th, 1998 supports that "She is still unable to return to work - off till 14/8/98".

[para16] Dr. Kippen had given Dr. Gooi an interim report on June 18th, to say that he was arranging for an upper gastrointestinal endoscopy as well as X-rays of the Appellant's thoracic spine and would report further in due course. The subsequent report of September 9th says that the Appellant "appears to be doing somewhat better in regards to the pain, in that she has some control with Arthrotec 50 mg. once or twice a day for the local inflammatory change in the chest wall and back.....I believe all of her pains are related to the trauma of her accident and the sternal fracture and related stress to the chest wall.....I am not sure when these conditions will heal sufficiently to allow her to use her upper extremities normally."

[para17] Dr. Gooi had also arranged for the Appellant to be examined by Dr. Lau, psychiatrist, by whom she was initially examined on October 8th, 1998. Dr. Lau's report of October 15th reflects a healed fracture but continued pain in

the sternum and between the shoulder blades of the Appellant, particularly with movement and activity. He diagnosed costochondritis and myofascial pain of the mid-back muscles. Dr. Lau referred the Appellant to the physiotherapy department at Health Sciences Centre for instruction on an exercise program that she was to carry out on a daily basis. It is noteworthy that Dr. Lau and Dr. Gooi were both able to converse with X.Y. in [text deleted], her native tongue.

[para18] More latterly, in response to an inquiry from Mr. Greenberg, Dr. Kippen reported on February 11th, 1999 on his examination and findings with respect to X.Y. That report from Dr. Kippen reads, in part, as follows:

I examined this lady on June 3rd, 1998 at the referral of Dr. T. Gooi because of back and chest pains and their possible relationship to gastrointestinal problems.....At that time I felt the majority of her chest wall pain and back pain was related to the blunt trauma to her sternum which had been severe enough to fracture the sternum. It was felt that this would obviously be compatible with muscle tearing and strain to anterior and posterior chest which was accounting for the majority of her pain.....I feel she was functionally limited in ability to use her arms without aggravating the pain in her anterior and posterior chest. I believe this was directly as a result to (sic) the blunt trauma to the area.....I suggested she not do any heavy lifting or straining with the upper extremities. I also suggested a consultation with a physical medicine specialist or psychiatrist to try and help her with physiotherapy to increase the strength and support of the muscle groups to allow her to regain some of the function of the upper arms to allow her to return to the normal work force. However, until she has undergone extensive physiotherapy, I feel it would be unlikely that she can return to her usual employment using her arms for heavy lifting or straining working the sewing machines.....When last seen on January 27th, 1999 her weight was stable and her breathing had improved to the point where she could take a big breath without aggravating the pain.

[para19] A report from Dr. Lau, addressed to the Appellant's former lawyer, bearing date February 8th, 1999, reads in part as follows:

When I examined her on January 21st, 1999, she had significant tenderness, muscular taut bands and myofascial trigger points in multiple muscles of her posterior neck and shoulder girdle areas. Specific muscles involved included the trapezius, supraspinatus, infraspinatus, and rhomboids, right side worse than the

left. I had started a trial of myofascial trigger point injection treatments with Zylocaine into the tender muscles.

Based on the clinical findings and investigations, no physical impairment is identified. However, she currently suffers from a partial, temporary disability due to her painful muscles and painful costochondral joints. It is my opinion that her painful symptoms currently prevent her from returning to work as a sewing machine operator.

However, she is not totally disabled. I believe she would be capable of pursuing light or sedentary type activities. She is only unfit to return to her previous work as a sewing machine operator given her current symptoms. As to how long (the Appellant) will continue to be partially disabled from her previous occupation, this will depend on her response to the current injection treatments and the stretching and strengthening exercises provided by her physiotherapist. I would be able to provide you with a better answer in six to eight weeks.

[para20] While we have carefully reviewed all of the medical evidence presented to us, we do not find it necessary to discuss, in these Reasons, any of the medical and paramedical reports that post-date Dr. Lau's letter of February 8th, 1999. The only issue before us is whether MPIC was justified in terminating her income replacement benefits as of May 1st, 1998. While we have noted that Dr. Kippen speaks of the Appellant's inability to use her arms "for heavy lifting or straining working the sewing machines", it is fair to add that, by X.Y.'s own evidence, the actual lifting she was required to do could hardly be classified as 'heavy'. Yet, at the same time, it was quite clear from the evidence that her work does entail a straining or stretching of the areas of her upper body to which both Drs. Kippen and Lau refer. That work requires her to sew elastic portions of parkas and other winter outerwear, and this entails stretching the elastic over non-stretchable fabric as those materials are fed concurrently through the sewing machine, using the multiple muscles of her shoulder girdle and the costal cartilages that were still inflamed at the time of Dr. Lau's examination on October 8th, 1998.

[para21] We are satisfied that, on a strong balance of probabilities, the Appellant was not, in fact, able on May 1st, 1998 to hold the employment that she held at the time of her accident. We are of the view that Mr. Greenberg's decision to discontinue her income replacement indemnity was premature, based as it was upon the estimates of Drs. Gooi and Rothman, expressed in April of 1998, that X.Y. should be able to return to work by the beginning of May. Those estimates,

while undoubtedly expressed in good faith, are shown by the evidence of Drs. Kippen and Lau to have been unduly optimistic. Dr. Gooi, himself, revised that view subsequently. We find, therefore, that X.Y. was not capable of resuming her former employment by the date when the insurer terminated her IRI which should, therefore, be reinstated.

[para22] X.Y. testified that she has an appointment with Dr. Conrad Hoy on December 22nd. MPIC will be able to reassess her ability to return to work, if only on a graduated basis, once it has received an up-dated report from Dr. Hoy.

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